

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

JOSEPH R. CUNNINGHAM,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 00-693-GMS
)	
KENNETH S. APFEL,)	
COMMISSIONER OF)	
SOCIAL SECURITY)	
)	
Defendants.)	
)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On April 20, 1998, the plaintiff, Joseph R. Cunningham, applied for Social Security Disability Insurance Benefits (“DIB”), alleging that he had been disabled since January 2, 1998. He was denied DIB on July 28, 1998, and again upon reconsideration on September 8, 1998. Cunningham then filed a request for a hearing before an Administrative Law Judge (“ALJ”), on September 18, 1998. A hearing was held on February 25, 1999, before ALJ David S. Antrobus (“ALJ Antrobus). In a decision dated August 26, 1999, ALJ Antrobus found that Cunningham was not entitled to DIB under 42 U.S.C. § § 216(i) and 223. Cunningham requested review before the Appeals Council. His request was denied on June 19, 2000. Having exhausted his administrative remedies, Cunningham filed a complaint with this court on August 1, 2000. The Commissioner answered on November 22, 2000. Cunningham moved for summary judgment on January 16, 2001, and the Commissioner filed a cross-motion for summary judgment on February 23,

2001. Because the court finds that the ALJ's denial of DIB was supported by substantial evidence, the court will deny Cunningham's motion and grant summary judgment for the Commissioner.

II. BACKGROUND

Cunningham is a 39 year old male who was five feet eleven inches tall and weighed approximately 195 pounds at the time of the February 25, 1999 hearing. He has completed eight years of formal education. Cunningham was employed as machine operator from 1979 to 1998, but has not been employed in any capacity since January 2, 1998. Cunningham reported that he stopped working because he considered himself unable to perform his employment duties. Medical records indicate, however, that he stopped working because his employer went out of business. Cunningham claims he is unable to work primarily as a result of lower back and hip pain caused by a degenerative arthritic condition compounded by loss of depth perception in his left eye.

A. Medical Evidence

Cunningham has been treated by Jeffrey K. Kerner, D.O., at various times since March 1983 for complaints of back pain. In January 1998, Dr. Kerner ordered that Cunningham undergo an x-ray examination. The x-rays revealed minimal degenerative changes to the lumbar spine region, somewhat prominent degenerative arthritic changes in the bilateral sacroiliac joints, and very minimal changes in the hip joints.¹ Dr. Kerner concluded that Cunningham was not able to sit, stand, or walk for long periods of

¹Sacroiliac joints are those joints surrounding the sacrum, the bone just below the lumbar vertebrae.

time, but would be able to do some types of sedentary work if properly trained.

At the request of the Delaware Disability Determination Service (“DDDS”), John F. DeCarli, D.O., examined Cunningham in June 1998. Dr. DeCarli was asked to determine the severity of Cunningham’s degenerative condition and his residual functional capacity, if any. He found that Cunningham had normal range of hip motion and somewhat limited lumbar flexion and extension. The results of a straight leg-raising test were positive on the left, but negative on the right. Dr. DeCarli formed an impression of low back pain secondary to probable degenerative joint disease with radiculopathy.² In his residual functioning capacity test, Dr. DeCarli stated that the severity and duration of Cunningham’s alleged symptoms were disproportionate to the expected severity or duration on the basis of his medically determinable ailment.

In May 1999, Dr. Yong K. Kim, a consultative examiner, also examined Cunningham at the request of the DDDS to determine the extent of his degenerative back condition. Cunningham provided a history of worsening back pain, but Dr. Kim advised that he was able to sit for thirty minutes without interruption, stand for thirty minutes, walk two to three blocks and lift twenty pounds. X-rays showed no evidence of pathology in Cunningham’s pelvis, hips, or cervical or lumbosacral spines, although marked degenerative and hypertrophic changes were noted at the costovertebral junctions, which are the meeting point of the rib and vertebra.

²Radiculopathy is a disease of the nerve roots.

Joseph Goldberg, M.D. examined Cunningham's vision on April 10, 1998. Dr. Goldberg noted that "everything was pretty normal in the exam." (D.I. 5 at 118.) Although Cunningham's vision in his left eye was poor, it had gone uncorrected since age 17, and Cunningham seemed to function adequately with his limited visual capacity. Cunningham had no other complaints about his visual function.

B. Testimony at Hearing Before ALJ Antrobus

The two witnesses at the hearing before ALJ Antrobus were Cunningham and William T. Slaven, III, a vocational expert. Cunningham reported that he was unable to do even simple work around the house and could stand no more than approximately fifteen minutes at a time. He described excruciating pain in his back, and stated that he was unable to do any lifting.

ALJ Antrobus then asked Slaven to determine if there were alternative jobs in the national economy that Cunningham could perform, taking into account Cunningham's age, limited education, and lack of transferable skills. Slaven stated that if Cunningham's pain were mild to moderate, he could perform the sedentary jobs of cutter/paster/press clipper (500 jobs statewide, 20,000 nationally), label cutter (560 jobs statewide, 20,500 nationally), and order clerk (2000 jobs statewide, 65,000 nationally).

C. The ALJ's Findings

ALJ Antrobus found that Cunningham was unable to perform his past work as a machine operator and had no transferrable work skills. ALJ Antrobus also found that the medical evidence established that Cunningham suffered from severe degenerative osteoarthritis with associated pain, further complicated by visual loss in his left eye. However, he determined that Cunningham did not have an impairment or combination of impairments listed in or medically equal to any of those listed in Appendix 1, Subpart P, Regulations No. 4. ALJ Antrobus further found that notwithstanding the fact that Cunningham could not

lift more than ten pounds or engage in prolonged sitting without alternating his position, he had the residual functional capacity to perform the physical exertion and nonexertional requirements of work. Although this conclusion was contrary to Dr. Kerner's findings, ALJ Antrobus noted that the reports of the consulting examiners and Dr. Kerner were inconsistent. ALJ Antrobus believed that the reports of the consulting physicians were more recent and therefore more reliable.

Furthermore, ALJ Antrobus noted that Dr. Kerner's testimony was based largely on Cunningham's self-reports of pain. However, ALJ Antrobus did not find Cunningham's testimony regarding the severity of his symptoms or the extent of his functional limitations to be entirely credible. Although Cunningham testified that he could not walk, lift, or stand for long periods, in his applications for social security he admitted that he engaged in a variety of activities including driving, light lawn work, laundry, shopping, fishing and playing games with his children. (D.I. 5 at 88, 96.) Based on this evidence, ALJ Antrobus determined that Cunningham experienced only mild to moderate pain. Consequently, ALJ Antrobus found that he was capable of performing the jobs described by Slaven. Given his age, education, work experience, and ability to work, ALJ Antrobus concluded that Rule 201.25 directed a finding that Cunningham was not disabled. (D.I. 5 at 23.)

In his motion for summary judgment, Cunningham alleges that ALJ Antrobus failed to give adequate weight to the opinion of the treating physician. Cunningham also asserts that ALJ Antrobus improperly failed to consider his testimony regarding the severity of his pain. In his cross-motion, the Commissioner responds that appropriate weight was given to all testimony and the conclusions were supported by substantial evidence.

III. STANDARD OF REVIEW

The court must uphold the ALJ's factual decisions if they are supported by "substantial evidence". See 42 U.S.C. §§ 405(g) and 1383(c)(3); see also *Fargnoli v. Massanari*, 247 F.3d 34, 38 (3d Cir. 2001) (stating "[w]here the ALJ's findings of fact are supported by substantial evidence, . . . [the court is] bound by those findings, even if . . . [it] would have decided the factual issue differently") (citing cases). This standard applies to motions for summary judgment filed pursuant to Fed. R. Civ. P. 56(c) in social security cases. See *Woody v. Sec. of the Dep't of Health and Human Serv.*, 859 F.2d 1156, 1159 (3d Cir. 1988). "Substantial evidence" has been said to amount to more than "a mere scintilla." See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See *id.* See also *Richardson v. Perales*, 402 U.S. 389, 402 (1971). Thus, "substantial evidence" may be slightly less than a preponderance. See *Jesurum v. Sec'y. of the United States Dept. of Health and Human Servs.*, 48 F.3d 114, 117 (3d Cir. 1995).

Additionally, credibility determinations are the province of the ALJ and should only be disturbed on review if not supported by substantial evidence. *Pysher v. Apfel*, Civ. A. No. 00-1309, 2001 WL 793305, at *2 (E.D. Pa. Jul. 11, 2001) (citing *Van Horn v. Schweiker*, 717 F.2d 871, 973 (3d Cir. 1983)). To demonstrate that the ALJ's opinion is based on substantial evidence, the ALJ must make specific findings of fact to support her or his ultimate findings. *Portlock v. Apfel*, Civ. A. No. 99-931, 2001 WL 753879, at *7 (D. Del. Jul. 3, 2001) (citing *See Stewart v. Secretary of HEW*, 714 F.2d 287, 290 (3d Cir. 1983)). Thus, the inquiry is not whether the court would have made the same determination, but rather, whether the Commissioner's conclusion was reasonable. See *Brown v. Bowen*, 845 F.2d 1211, 1213 (3d Cir. 1988).

IV. DISCUSSION

A. Applicable Statute and Law

The Social Security Act defines “disability” as the inability “to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 1382c(a)(3)(A). The Commissioner has promulgated regulations for determining disability by application of a five-step sequential analysis. *See* 20 C.F.R. § 404.1520. The ALJ, reviewing Appeals Council, and the Commissioner evaluate each case according to this five-step process until a finding of “disabled” or “not disabled” is obtained. *See id.* at § 404.1520(a). The process is summarized as follows:³

- I. If the claimant currently is engaged in substantial gainful employment, he will be found “not disabled.”
2. If the claimant does not suffer from a “severe impairment,” he will be found “not disabled.”
3. If the severe impairment meets or equals a listed impairment in 20 C.F.R. Part 404, Subpart P, Appendix 1 and has lasted or is expected to last for a continuous period of at least twelve months, the claimant will be found “disabled.”
4. If the claimant can still perform work he has done in the past (“past relevant work”) despite the severe impairment, he will be found “not disabled.”
5. Finally, the Commissioner will consider the claimant’s ability to perform work (“residual functional capacity”), age, education and past work experience to determine whether or not he or she is capable of performing other work in the national economy. If he or she is incapable, a finding of disability will be entered. Conversely if the claimant can perform other work, he will be found “not disabled.”

20 C.F.R. § 404.1520 (b)-(f) (2000).

³The following five-step process is summarized and numbered for convenience and corresponds to 20 C.F.R. § 404.1520 (b)-(f) (2000).

The disability determination analysis involves a shifting burden of proof. *See Wallace v. Secretary of Health & Human Servs.*, 722 F.2d 1150, 1153 (3d Cir. 1983). In the first four steps of the analysis, the burden is on the claimant to prove every element of his or her claim by a preponderance of the evidence. At step five, however, the burden shifts to the Commissioner to prove that there is some other kind of substantial gainful employment the claimant is able to perform. *See Sykes v. Apfel*, 228 F.3d 259, 263 (3d Cir. 2000); *see also Kangas v. Bowen*, 823 F.2d 775, 777 (3d Cir. 1987); *Olsen v. Schweiker*, 703 F.2d 751, 753 (3d Cir. 1983). Substantial gainful employment is defined as “work that - (a) involves doing significant and productive physical or mental duties; and (b) is done (or intended) for pay or profit.” 20 C.F.R. § 404.1510. When determining whether substantial gainful employment is available, the ALJ is not limited to consideration of the claimant’s his prior work, but may also consider any other substantial gainful activity which exists in the national economy. *See* 42 U.S.C. § 423 (d)(1)(A), (2)(A); *Heckler v. Campbell*, 461 U.S. 458, 460 (1983).

ALJ Antrobus found that although Cunningham was unable to perform his former job, there were other jobs in the national economy that Cunningham could perform in his current condition if trained properly. The parties do not dispute Slaven’s testimony regarding the existence of jobs. Rather, the dispute centers around whether Cunningham had the residual functional capacity to perform the sedentary work. Thus, step five is the primary focus of the present case. Therefore, the court will focus solely on this issue.

B. The ALJ's Finding of "Not Disabled" at Step Five is Supported by Substantial Evidence

Cunningham contends that the ALJ's finding that he could perform sedentary work was not supported by substantial evidence because ALJ Antrobus rejected Cunningham's testimony and did not give his treating physician's testimony proper weight. Upon consideration of the record and the parties' submissions, the court finds that the decision not to give controlling weight to the testimony of Cunningham and Dr. Kerner was reasonable and supported by substantial evidence.

1. The Weight Given to Dr. Kerner's testimony

ALJ Antrobus was entitled to rely on the testimony of the consulting physicians rather than the treating physician. In general, special weight is accorded to the treating physician because of the longevity of the relationship with the claimant. *See Mason v. Shalala*, 994 F.2d 1058, 1067 (3d Cir. 1993). However, the ALJ is not bound to accept the opinion of a treating physician without weighing it against the other medical evidence of record. *See Kent v. Schweiker*, 710 F.2d 110, 115 (3rd Cir.1983). The Commissioner has mandated that the opinions of state agency medical and psychological consultants must be treated as expert opinion evidence from nonexamining sources. *See S.S.A. Rul. 96-2p* (July 2, 1996). Thus, "[i]n order for the opinion of a treating physician to be controlling, it must be well-supported by medically acceptable clinical and laboratory diagnostic techniques and not be inconsistent with other substantial and non-medical evidence of record." 20 CFR 404.1527(d)(2).

The opinions of the treating physician and the consulting physicians were inconsistent. In his April 1998 report, Dr. Kerner indicated that Cunningham was not able to sit, stand, or walk for long periods of time. However, Dr. DeCarli concluded Cunningham was capable of sitting and standing for about six hours

each in an eight-hour workday. Dr. Kim also determined that Cunningham was able to stand or walk for a total of four hours each in a eight-hour workday and for 30-45 minutes without interruption. Clearly, the treating physician and the consulting doctors disagreed about whether Cunningham was able to sit or stand at work. This disparity gave ALJ Antrobus a reasonable doubt as to the extent of Cunningham's limitations. Since Dr. Kerner's indication that Cunningham was unable to sit or stand was refuted by both consulting examiners, ALJ Antrobus had a sufficient basis to reject Dr. Kerner's opinion on this point.

Furthermore, if the treating physician's findings are based largely upon claimant's self-reported symptoms and there is conflicting medical evidence, the ALJ need not give the treating physician's testimony controlling weight. *See Maestro v. Apfel*, No.00-1105, 2001 WL 758756, at *5 (4th Cir. July 5, 2001). ALJ Antrobus found that Dr. Kerner's diagnosis regarding Cunningham's ability to stand was based on "subjective complaints of discomfort and not supported by objective evidence." (D.I. 5 at 20). This conclusion is supported by the evidence. The record demonstrates that other than the x-rays performed in January 1998, Dr. Kerner offered little medical evidence in support of Cunningham's disability. Moreover, there was conflicting medical evidence regarding the x-rays. Dr. Kim also used x-rays in his May 1999 assessment. Although Dr. Kerner's x-rays showed damage to the lumbar region, Dr. Kim's x-rays did not. Nearly eighteen months passed between the two examinations. Faced with two sets of conflicting data, ALJ Antrobus concluded that Dr. Kim's assessment was more reliable because it was based on more recent evidence. The court concludes that it was proper for ALJ Antrobus to rely on the later examination.

Finally, social security regulations indicate that the better the explanation a source provides for an opinion, the more weight an ALJ should give that opinion. *See* 20 C.F.R. § 404.1527(d)(3). Dr. Kerner's opinion that Cunningham could not work was based in part on Cunningham's limited education and lack of transferrable skills. These are not medical indicia that give support to Dr. Kerner's opinion. Characteristics such as age and education more properly serve as the basis for an opinion by a vocational rather than a medical expert. For all of the above reasons, the ALJ attributed proper weight to the opinion of the treating physician.

2. The Credibility of Cunningham's Testimony

It is within the ALJ's discretion "to evaluate the credibility of a claimant and to arrive at an independent judgment in light of medical findings and other evidence regarding the true extent of the pain alleged by the claimant." *See Brown v. Schweiker*, 562 F.Supp. 284, 287 (E.D. Pa. 1983). (quoting *Bolton v. Secretary of HHS*, 504 F.Supp. 288 (E.D.N.Y.1980)). Although "[a]n ALJ must give serious consideration to claimant's subjective complaints of pain." *Mason v. Shalala*, 994 F.2d 1058, 1067 (3d Cir. 1993), subjective complaints of pain "do not in themselves constitute disability." *Green v. Schweiker*, 749 F.2d 1066, 1070 (3rd Cir.1984). Subjective complaints are given "great weight" unless there is conflicting medical evidence. *See Mason*, 994 F.2d at 1067-68. When a claimant's subjective complaints of pain indicate a greater severity of impairment than the objective medical evidence supports, the ALJ can give weight to factors such as physician's reports and claimant's daily activities. *See* 20 C.F.R. § 404.1529 (c)(3) (1995).

The objective medical evidence contradicted Cunningham's subjective reports of pain. Although Cunningham stated that he could not lift or stand at all, Drs. Kim and DeCarli both indicated that he was capable of lifting light weights and standing for short periods. Moreover, Cunningham's reports of pain also conflicted with his own prior statements regarding his ability to function. While testifying before the ALJ, Cunningham indicated that he performs no household activities, has no social life, and no longer goes fishing because of the severity of the pain. Cunningham also stated that he was unable to lift any weight, could stand for only fifteen minutes, and could not walk for more than fifteen consecutive minutes. However, in his social security applications, Cunningham stated that he was able to drive, do lawn work, go fishing, play games with his children and go on short shopping trips. Cunningham's prior statements concerning his daily activities contrasted with his statements at the hearing. This created doubts as to his credibility. ALJ Antrobus noted these inconsistencies and, as a result, properly exercised his discretion and determined that Cunningham's testimony was unreliable. In light of the fact that Cunningham's testimony was inconsistent with both his own prior statements and the relevant medical reports, this rejection was reasonable.

V. CONCLUSION

Upon reviewing the medical evidence, the testimony at the hearing, and ALJ Antrobus's decision, the court concludes that the Commissioner's finding that Cunningham is ineligible for disability benefits pursuant 42 U.S.C. § § 216(i) and 223 is supported by substantial evidence. ALJ Antrobus's credibility determination was proper in light of the medical evidence presented and his findings regarding Cunningham's cumulative impairments and residual functioning capacity are supported by substantial evidence. Therefore, the Commissioner's motion for summary judgment is granted.

Therefore, IT IS HEREBY ORDERED that:

1. Cunningham's motion for summary judgment (D.I. 7) pursuant to Fed. R. Civ 56(c) is DENIED.
2. The Commissioner's motion for summary judgment (D.I. 9) is GRANTED.
3. Judgment be and is hereby ENTERED in favor of the Commissioner on all claims pending against him.

Date: 7, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE